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Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS MIGUEL SAENZ, Defendant and Appellant.	B280356 Los Angeles County Super. Ct. No. KA110231

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed and remanded with directions.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jesus Miguel Saenz appeals from his conviction for attempted voluntary manslaughter, assault with a deadly weapon, corporal injury to his girlfriend, and other crimes. Saenz contends the trial court erred in permitting the prosecution to redact statements by Saenz that can be heard in the background during the victim's 911 call for help before the recording was played for the jury. We find no error and affirm Saenz's conviction. We remand the matter to the trial court for the limited purpose of determining whether to exercise its discretion to strike the serious felony enhancements under Senate Bill No. 1393.

FACTS AND PROCEDURAL BACKGROUND

1. *The events of July 26, 2015*

In July 2015 Suzanna E. was living with Saenz, her boyfriend, on West Orange Grove in Pomona. They had been dating for about two years and living together for about six months. At 12:57 a.m. on July 26, the Pomona Police Department received a 911 call from the Orange Grove address. The caller—later identified as Suzanna—told the operator her boyfriend would not let her out of the house, was beating her up, had been "using pillows and fists with [her]," and had been suffocating her. Suzanna said he had "hit [her] the other day" and he had been "doing this for a while"; she had not called the police "because [she] thought he was gonna leave, but he hasn't left and now it's getting worse." Suzanna told the operator she had barricaded herself in the bathroom.

Pomona Police Department Officer Jesse Hedrick and his partner Officer Kenneth Maiques arrived at the apartment about 1:00 a.m. They knocked loudly on the front door five or six times and "identified [themselves] as police officers." There was no response, and the officers could not hear anything inside the apartment. The 911 operator told the dispatcher, who told the

officers, "it sounded like she [presumably referring to the female caller] was being suffocated" or "smothered." Hedrick and Maiques then opened a front-facing window and climbed into the apartment.

It was dark inside the apartment. The coffee table had been overturned. Maiques heard a woman scream, "[h]elp me," from the back of the apartment. As Hedrick and Maiques made their way "through the apartment," Suzanna came running toward them from the back of the apartment. She appeared to be extremely distraught and was crying hysterically. Her face was red and swollen. The officers told Suzanna to go to the living room and stay there.

Hedrick and Maiques found Saenz sitting on the bed in the bedroom. Saenz was wearing pants but no shirt. The officers handcuffed Saenz; Maiques then put him in the police car and drove him to the station.

Hedrick spoke with Suzanna. Suzanna told him she and Saenz had shared a pint of vodka "throughout the day." Suzanna said a friend of hers had come to the apartment "wanting her to come out" and talk but Saenz refused to let her leave. Saenz told Suzanna, "You are not going fucking nowhere." Suzanna tried to leave through the front door but Saenz "blocked the door" and locked it. Suzanna tried to go out through the front window but Saenz grabbed her by the shoulders, pulled her back into the apartment, closed the window, and used a stick so the window could not be opened.

Saenz then pushed Suzanna to the floor and used his forearm to choke her.[1] Suzanna was so frightened she urinated

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[1] Forensic nurse Melinda Wheeler testified at the trial that the verb "choke" is frequently misused in place of the proper term "strangle." "Choke" refers to "an internal blockage," such as a

on herself. Hedrick saw "the pants that she was wearing [were] soaked." Suzanna eventually was able to get out from under Saenz, run into the bedroom, and lock the door behind her. Saenz kicked the bedroom door open, pushed Suzanna down onto the bed, and began to suffocate her with a pillow from the bed. Hedrick saw and photographed the damage to the door frame. Suzanna was able again to get away. She ran into the bathroom, closed the door, and called 911. Saenz came into the bathroom, Suzanna ran past him into the living room, Saenz again threw Suzanna to the ground, then he grabbed a pillow from the couch and tried again to suffocate her. At that juncture, police could be heard at the door. Saenz took Suzanna into the bedroom, held her by the throat, and told her to be quiet.

Hedrick saw bruising, scratches, and red marks on Suzanna's throat. There was redness on her face and her left eye was bruised and swollen. Suzanna told Hedrick the bruise was from an incident several days earlier: Saenz had been in a fight, Suzanna had tried to break up the fight, and Saenz had punched her several times. Hedrick also saw bruising around Suzanna's ears and red marks next to her ears. Suzanna told Hedrick the finger marks and bruising on her arms were from Saenz grabbing her. Suzanna said all of her injuries were attributable to Saenz. Hedrick recorded his conversation with Suzanna.

2. *The charges, motion in limine, and trial*

The People charged Saenz with attempted murder, assault with a deadly weapon (a pillow), assault by means of force likely to cause great bodily injury, corporal injury to a cohabitant or

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piece of food. By contrast, "when there is external pressure applied to the neck, that is actually called strangulation" and the proper phrasing is "he . . . strangled me." We use both terms here as used by the police and lay witnesses at trial.

girlfriend, and false imprisonment by violence.[2] The case proceeded to trial in July 2016. The People filed a trial brief stating they intended to introduce Suzanna's 911 call into evidence. The prosecution argued Suzanna's statements were admissible under Evidence Code sections 1240 and 1241.

The People also moved in limine to exclude Saenz's statements on the recording of the 911 call. The prosecutor submitted a transcript of the call: After Suzanna told the operator Saenz was "pinning me down and beating me and like he won't let me out of the house," Saenz could be heard saying, "She's drinking." Later he said, "You're tripping;" "Ok[ay] just relax;" "You're lying;" "You're lying to them;" and "You're lying again, so why are you lying to them?" When Suzanna could be heard telling Saenz, "[T]he[y're] going to see the bruises and the marks," Saenz responded, "I didn't do those." Saenz continued to accuse Suzanna of lying.

Before jury selection began, the trial court discussed the issue with counsel. The prosecutor had submitted to the court copies of both the entire unredacted recording of the 911 call and the version edited to delete Saenz's statements as well as some of Suzanna's statements,[3] together with transcripts. When the

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[2] The People also charged Saenz with misdemeanor possession of methamphetamine. When Maiques took Saenz to jail, Saenz told him he had "a controlled substance on him." Maiques found a small baggie of methamphetamine in the cargo pocket of the shorts Saenz was wearing under his jeans. Saenz does not challenge his conviction on this misdemeanor count.

[3] The prosecutor proposed to redact not only Saenz's statements but also Suzanna's statements that the police would see her injuries. Suzanna's statements, "well the[y're] going to see the bruises and the marks;" "the cops [are] going to see all the marks on me;" and "I have the marks [from] the other day, the

court first addressed the issue, it had read the transcript but not yet listened to the recording. Turning first to Suzanna's statements, the court said, "[A]ssuming that the proper foundation is laid, the court's tentative is to admit the 911 tape" under Evidence Code sections 1240 and 1241.

The court then addressed the prosecution's motion to exclude Saenz's statements on the recording. The prosecutor argued the rule of completeness embodied in Evidence Code section 356 did not apply: "[I]n this particular case[,] eliminating the defendant's statements doesn't misrepresent . . . what the victim is relaying to the dispatcher." The prosecutor continued: "[When] the victim shouted out, 'I am on the phone with the police,' and then the defendant starts making his . . . self-serving statements, I think they're contrived, and I don't think they're spontaneous."

Defense counsel responded, "[T]he defense position is that the statements are spontaneous. They are part and parcel of the whole phone call. . . . So just as much as she is describing what is happening, he's responding to that. And that is part and parcel of the entire event. And taking those statements out would be misleading to the jury. . . . Even if the court says that it is hearsay, I would submit to the court that it is his mental state. It's not offered for the truth of the matter asserted. It shows his state of mind at that time . . . ."

The court first summarized the rule of completeness, noting the rule "does allow for a statement . . . to be presented in its entirety if that portion that was left out is needed to be able to explain the part that was sought to be introduced by one side[,] in

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cops are gonna come and see it. . . . I swear I have a black eye from the other day, from him," were all removed before the recording was played for the jury.

this case here, the prosecutor." The court then described the photographs of Suzanna's injuries, adding that a responding officer saw her urine-soaked clothing. The court concluded, "[I]f the defendant takes the stand—and I understand that it's his absolute constitutional right not to take the stand. Certainly, he can explain, and if he takes the stand, I suspect that the entire phone call can be played, and he can explain why he did say why she's lying and what happened to her. And why the injuries are present and why he didn't inflict those upon her. But if he chooses not to testify, it is apparent at this point, without having any further information, that those statements are self-serving and contrived, and they are hearsay, and they are calmly stated. . . . [A]nd the physical evidence contradicts what he's saying. So I am going to exclude his statements until such time that he decides to take the stand and testify."[4]

The next day the court revisited the issue. The court read Evidence Code section 356 aloud. The prosecutor then discussed two cases cited in her trial brief. The court said, "It is hearsay unless it comes in under [section] 356, but . . . I agree with the reasoning that the statement of this complaining witness is . . . complete in and of itself. You don't need anything else to explain her statement or to make that statement understood. His statements are a defense. So . . . if he takes the stand, then it would come in as a prior consistent statement and as evidence

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[4] The court also raised the issue of comments on the recording by the 911 operator at the end of the call, "That one gave me chills. Really. Yeah. I think he's trying to muffle her." Defense counsel confirmed that she wanted those comments redacted. The prosecutor later confirmed she would edit the recording "to delete all of the comments in the end," and she did so.

that his position of innocence is not a recent fabrication. . . . And I don't think it comes in under 356 because . . . her statements are complete in and of [themselves] and nothing else need[s] to be added to it—or his statements don't add anything to it. . . . I think the People can play the 911 call without his comments in the 911 call." The prosecutor stated, "I think it's very clear that excluding his statements does not mislead what the victim is conveying to the dispatcher as she's conveying it." The court responded, "Right. There's no gray area as to what she's saying, and there's nothing that would explain her comments to the 911 operator . . . contained in anything he says."

Defense counsel asked the court to listen to the recording, arguing, "She's saying things in response to what he's saying. I think those portions are necessary because, again, the jury is gonna be left to wonder, what is going on in the background and what is being said?" The court said it would listen to both the original and the edited versions of the recording.

The edited 911 tape was played for the jury. Robin Oliver, a senior dispatcher for the Pomona Police Department, testified she handled Suzanna's 911 call. Oliver confirmed the call came from the Orange Grove address. Oliver testified that she recognized her own voice as well as that of the caller.

Two days later, midway through the People's case, Saenz's attorney again raised the issue of Saenz's statements in the recording. Counsel argued, "I think the 911 call is not only potentially exonerating evidence, but also evidence of the full picture of what happened that night. And the jury is not being allowed to see that and to hear that. And . . . that's not fair to the defense. . . . [A]nd again, I would argue that under the completeness rule, you need the defendant's statements for the wholeness of the call." Defense counsel said she planned to play

the unredacted recording in the defense case. The court again said it would listen to the unedited recording of the call.

Later that day, the court told counsel, "I did listen to the unredacted 911 call." The court recited Saenz's statements during the call. The court stated it had reread Evidence Code section 356 and *People v. Cornejo* (2016) 3 Cal.App.5th 36 (*Cornejo*). The court said, "In this case, the conversation between the victim and the 911 operator requires no explanation as to what is being said by either side. The defendant is not even part of that conversation. He's kind of just—for lack of a better word, just chiming in in the back. Whether or not that's a self-serving statement is not the issue. It can come in if it's a self-serving statement. . . . [I]t doesn't explain why she's lying. It doesn't explain how the injuries that are alleged occurred. Just a blanket statement that she is lying . . . . So I don't think that the rule of completeness is applicable here under [this] set of circumstances."[5]

Suzanna testified at trial. She said she "love[d] [Saenz] more than anything." She continued, "Like, he took care of me. And my kids love him. I mean, we had ups and down[s], but it wasn't like serious. We were always happy." Suzanna added, "And it was just when I lost my kids, things went downhill."

Suzanna testified she had been "drinking all day since in the morning" and the "last thing [she] remember[ed] was cooking him dinner." Suzanna said she did not remember her 911 call "at all" but—when the prosecutor played the recording for her—she admitted "[t]hat was [her] voice." Suzanna also told the jury, "I don't remember anything that I told the cops, period."

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[5] The trial court went on to rule that Saenz's statements were not admissible under Evidence Code section 1240. As Saenz does not contest that ruling on appeal, we do not address it.

The prosecution introduced recordings of telephone conversations between Suzanna and Saenz when he was in jail. Suzanna told Saenz that "everybody told [her] the best thing [she] did for [him] was not to talk to police" and the "best thing that [she] did to help [him] . . . was hide." Suzanna said, "I don't have to fucking say shit. That's it. It's just like me not showing up, they're still gonna have to fucking drop the charges. That's what I'm gonna do."

Forensic nurse Wheeler testified Suzanna's injuries—including petechial hemorrhages (burst blood vessels) and scratches to her neck and face—were consistent with strangulation and smothering.

3. *The verdicts and sentence*

The jury found Saenz not guilty of attempted murder but guilty of the lesser crime of attempted voluntary manslaughter. The jury also convicted Saenz on the remaining counts. At a priors trial and sentencing proceeding on November 23, 2016, Saenz admitted two prior strike convictions for robbery in 2001 and 2005. The trial court denied Saenz's *Romero* motion.[6] The court sentenced Saenz to third-strike sentences of 25 years to life on the attempted manslaughter and assault with a deadly weapon counts. The court imposed two five-year priors under Penal Code section 667, subdivision (a)(1) on each of the third-strike counts, for sentences therefore of life with a minimum eligible parole date of 35 years. On the injury to a cohabitant, assault by means of force, and false imprisonment counts, the court chose the midterms and doubled each because of one prior strike. The court stayed the sentences on each of those three counts as well as on the second life count under Penal Code section 654.

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6 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

Saenz's sole contention on appeal is that the trial court erred in permitting the prosecution to redact his statements accusing Suzanna of lying during her 911 call before the recording of the call was played for the jury. Saenz argues (1) the redacted recording was an "altered writing" and the prosecution did not properly authenticate it under Evidence Code section 1402; and (2) the court should have admitted Saenz's background statements in the recording under the rule of completeness embodied in Evidence Code section 356.

1. *Our standard of review*

"A trial court's finding that sufficient foundational facts have been presented to support admissibility [of a writing] is reviewed for abuse of discretion." (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001.) We also review a trial court's determination of whether evidence is admissible under the statutory rule of completeness for abuse of discretion. (*People v. Pride* (1992) 3 Cal.4th 195, 235; *People v. Parrish* (2007) 152 Cal.App.4th 263, 274.) On appeal, we may not disturb a trial court's exercise of discretion in admitting or excluding evidence unless the appellant shows the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

2. *Saenz's contention that the audio recording of Suzanna's 911 call, redacted as ordered by the trial court, was an unauthenticated "altered writing" is meritless*

Saenz argues, "The redacted version of the 911 call admitted by the trial court was not an authentic copy of the 911 call because of the omission of [Saenz's] background statements." Saenz asserts the version of the recording played for the jury was

an "altered writing" within the meaning of Evidence Code section 1402.[7]

The Attorney General notes Saenz did not make this "authentication of an altered writing" objection at trial. The reason defense counsel at trial did not raise an objection under Evidence Code section 1402 is plain: any such objection would have been meritless. Section 1402 provides, "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof." (Evid. Code, § 1402.) Section 1402 obviously has to do with documents that appear to have been forged or altered in some unknown but perhaps nefarious or misleading way. (See, e.g., *Arneson v. Webster* (1964) 226 Cal.App.2d 370 [pre-section 1402 case; suit by real estate broker for commission; handwritten alteration to copy of agreement already signed by seller valid where evidence established seller had agreed to that term].)

There was no mystery or unexplained "alteration" here. The prosecutor submitted the entire unredacted recording to the trial court and the court listened to it. The prosecutor also gave the court and counsel a transcript of the unredacted call, as well as a transcript of the call, redacted as the prosecutor proposed. Oliver, a senior dispatcher at the Pomona Police Department, testified she recognized her own voice as well as a second female voice as those in a 911 call placed at 12:57 a.m. on July 26, 2015 from 1900 West Orange Grove in Pomona. Suzanna admitted the voice on the recording of the 911 call was hers.

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[7] A "writing" includes an audio recording. (Evid. Code, § 250.)

It is of course common for trial courts and lawyers to redact documents and recordings to remove irrelevant or prejudicial material such as—for example—references to gang membership or gang activity in a police interview of a defendant. Indeed, here, as noted, *defense* counsel asked for—and was granted—redactions in the 911 recording to delete the dispatcher's comments that the call "gave [her] chills" and the perpetrator was "trying to muffle" the victim. Such litigated and court-ordered redactions do not result in an "altered writing" within the meaning of Evidence Code section 1402.

3. *The trial court's exclusion of Saenz's background comments in the 911 call recording did not violate the rule of completeness*

Evidence Code section 356 codifies the common law doctrine of completeness. (*Cornejo*, *supra*, 3 Cal.App.5th at pp. 72-73.) That statute provides, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.) "The purpose of the rule 'is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' " (*Cornejo*, at p. 73.) "The obvious purpose of [section 356] is to avoid distortion of acts or statements that should be viewed in their proper context." (1 Witkin, Cal. Evidence (5th ed. 2018) Circumstantial Evidence, § 38.) However, " '[t]he rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy . . . .' " (*People v. Perry* (1972) 7 Cal.3d 756, 787.)

We have listened to the unredacted and redacted recordings of Suzanna's 911 call, and read the transcripts. While the trial court here initially stated that Saenz's statements heard in the background of Suzanna's 911 call were "self-serving and contrived," the court later clarified, stating (correctly), "Whether or not [a statement by Saenz is] a self-serving statement is not the issue. It can come in if it's a self-serving statement." (See, e.g., *People v. Douglas* (1991) 234 Cal.App.3d 273, 285 ["[t]he fact that declarations made by the accused were self-serving does not preclude their introduction in evidence as part of his whole statement" if the requirements of section 356 otherwise are met].)

After discussing the matter extensively with counsel, the trial court ultimately granted the prosecution's motion in limine because Saenz's statements did not "explain why [Suzanna was] lying" nor "explain how the injuries that [were] alleged occurred." Suzanna was recounting Saenz's assaults on her to the operator. Saenz's background pronouncements accusing Suzanna of drinking, "tripping," and lying merely denied and challenged her statements; they did not explain, put into context, or "complete" anything. "[S]ection 356 allows further inquiry into otherwise inadmissible matter only . . . [where] it is necessary to make the already introduced conversation *understood*." (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192-193 ["the new evidence . . . must be necessary to make the earlier conversation understood or to explain it"].)

In sum, the trial court did not abuse its discretion in excluding Saenz's statements. (Cf. *People v. Farley* (2009) 46 Cal.4th 1053, 1102-1103 [court's admission of some letters defendant wrote to victim but exclusion of others did not violate section 356; "letters proferred by the prosecution were 'independently comprehensible' on the relevant topics of defendant's premeditation and intent to kill"]; *People v. Williams*

(2006) 40 Cal.4th 287, 317-319 [court did not err in refusing to admit defendant's first tearful confession even though later detailed confession was admitted; prosecution objected as "exculpatory hearsay"; section 356 not violated because "no misleading impression was created by admitting one without the other"]; *People v. Sandoval* (1992) 4 Cal.4th 155, 177 [rule of completeness "did not require admission" of appointment book even though prosecution introduced slips of paper clipped to appointment book; book was "unnecessary to an understanding of the slips of paper"]; *People v. Barrick* (1982) 33 Cal.3d 115, 131 & fn. 4 [admission of defendant's prearrest statement but not postarrest statement did not violate section 356 because earlier statement was "independently comprehensible" and later statement was not "necessary to understand the earlier, prearrest statement"].)

4. *We remand the case for the trial court to consider any motion by Saenz to strike his serious felony enhancements*

After we filed our opinion in this case on November 15, 2018, Saenz filed a petition on November 16, 2018 for rehearing. Saenz asks us to remand his case to the trial court for the court to consider whether to strike his serious felony enhancements.

As noted, the court imposed two five-year priors under Penal Code section 667, subdivision (a)(1) on each of Saenz's third strike counts. At the time, the court had no discretion to strike the serious felony priors. (Pen. Code, § 1385, subd. (b); *People v. Jones* (1993) 12 Cal.App.4th 1106, 1116-1117.) On September 30, 2018, the Governor signed Senate Bill No. 1393, effective January 1, 2019. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.).) That legislation amended sections 667, subdivision (a), and 1385, subdivision (b), to allow the trial court to strike or dismiss a prior

serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)

We granted Saenz's petition for rehearing on December 14, 2018. Accordingly, Saenz's judgment of conviction is not yet final. The Attorney General concedes Senate Bill No. 1393 applies retroactively to defendants whose convictions were not final as of January 1. (See also *People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) Accordingly, we remand the case for the trial court to exercise its discretion whether to dismiss or strike one or both of Saenz's serious felony enhancements. We take no position on how the trial court should rule on any motion Saenz may file based on the new statute.

DISPOSITION

We remand to the trial court to consider exercising its discretion under Senate Bill No. 1393. In all other respects, we affirm the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J